U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0133 BLA

ROBERT CHEWNING Claimant-Respondent v. T & T MANAGEMENT COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMONCIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/05/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5862) of Administrative Law Judge Drew A. Swank rendered on a claim filed on August 29, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge found that claimant established over fifteen years in underground coal mine employment, and that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption.[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, contends that the administrative law judge erred in failing to apply the correct standard of proof on disability causation pursuant to Section 411(c)(4), and contends that, if the Board remands the case, it should instruct the administrative law judge to apply the proper standard of proof.[3]

[1] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] Employer concedes that claimant is entitled to invocation of the Section 411(c)(4) presumption. Employer's Brief at 9.

[3] The administrative law judge's findings of thirty-six years of qualifying coal mine employment, that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2), and that claimant was, therefore, entitled to invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4) are affirmed, as unchallenged on appeal. Decision and Order at 5, 12, 15-16; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis,[5] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015)(Boggs, J., concurring and dissenting). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have clinical and legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii).

The administrative law judge found that the evidence failed to show that claimant had clinical pneumoconiosis, Decision and Order at 10-12, but that through "the operation of [a] legal presumption," namely Section 411(c)(4), claimant had legal pneumoconiosis. Decision and Order at 16. Therefore, the administrative law judge found that the single issue to be determined in this case was whether employer rebutted the presumption of disability causation. Decision and Order at 17.

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[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Decision and Order at 6.

[5] "'Clinical pneumoconiosis' consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "'Legal pneumoconiosis' is defined in 20 C.F.R. §718.201(a)(2) as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." "[A] disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The administrative law judge noted that Dr. Bellotte opined that claimant's total disability is not caused by his coal mine employment.[6] Decision and Order at 18; Employer's Exhibit 3. The administrative law judge found, however, that Dr. Bellotte's opinion was "unpersuasive" because, while Dr. Bellotte opined "that [c]laimant's asthma account[ed] for many of his respiratory symptoms," he "disassociate[d] asthma from coal mine dust [exposure] contrary to the [p]reamble to the [r]egulations."[7] Decision and Order at 9, 17-19; *see* Employer's Exhibit 3 at 8-9. Specifically, the administrative law judge noted:

> While Dr. Bellotte is in all probability correct that [c]laimant has asthma and that his asthma is at least partly responsible for his pulmonary impairments, he fails to rebut the presumption that [c]laimant's legal coal workers' pneumoconiosis is a 'substantially contributing cause' of his total pulmonary or respiratory disability by sufficiently disassociating his asthma, or its severity, from his coal mine dust exposure.

Decision and Order at 18.

Thus, the administrative law judge found that Dr. Bellotte's opinion failed to rebut the presumption of causation. *Id*. at 18.[8]

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[6] Dr. Bellotte diagnosed claimant with asthma, which he stated "is a disease of the general population and is not caused by coal dust." Employer's Exhibit 3 at 8. He instead attributed claimant's disability and respiratory impairment to chronic aspiration of secretions into his lungs from his hiatal hernia and gastroesophageal reflux (GERDS), and noted that claimant may need surgical intervention to stop further pulmonary deterioration. Dr. Bellotte stated that countless medical articles associate GERDS, hiatal hernia and aspiration with pulmonary fibrosis and interstitial lung disease. In addition, Dr. Bellotte noted that claimant had heart disease, which required double bypass surgery as well as the placement of several stents. Dr. Bellotte concluded that claimant does not have either clinical or legal pneumoconiosis, noting that claimant "has no chronic dust disease of the lungs, or the sequelae thereof, that has been caused by, contributed to, or material [sic] aggravated by coal dust exposure in his coal mine employment history." Employer's Exhibit 3 at 8.

[7] The administrative law judge also found that the opinion of Dr. Jaworski, attributing claimant's pulmonary disability to both coal mine employment and smoking, was unpersuasive, as Dr. Jaworski failed to provide an explanation for his opinion. Decision and Order at 18; Director's Exhibits 18, 20.

[8] The administrative law judge referenced the inclusion of asthma as a chronic obstructive pulmonary disease in the preamble to the regulations. Decision and Order at

Employer contends that the administrative law judge erred in focusing on Dr. Bellotte's discussion of asthma as a basis for rejecting his opinion on disability causation.[9] In particular, employer contends that the administrative law judge erred in rejecting the opinion of Dr. Bellotte on the grounds that the doctor's discussion concerning claimant's asthma was inconsistent with the scientific literature approved by the Department of Labor (DOL) in the preamble and the regulations. Employer further contends that the administrative law judge, in essence, selectively analyzed Dr. Bellotte's opinion by focusing on Dr. Bellotte's finding regarding asthma without addressing Dr. Bellotte's other findings, namely that claimant's disabling respiratory impairment was due to the effects of his hiatal hernia, gastroesophageal reflux (GERDS) and cardiac disease.

At the outset, we note that the administrative law judge did not apply the proper standard of rebuttal in determining that employer failed to rebut the Section 411(c)(4) presumption. The administrative law judge found that the medical evidence failed to establish that "[c]laimant's legal pneumoconiosis [was] a 'substantially contributing cause' of his total pulmonary or respiratory disability." Decision and Order at 18. Pursuant to 20 C.F.R. §718.305(d)(ii), however, the correct standard employer must utilize to rebut the Section 411(c)(4) presumption is to "[establish] that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." Consequently, we vacate administrative law judge's

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18 n.17. In particular, the administrative law judge noted that, in relevant part, the preamble states:

> The term "chronic obstructive pulmonary disease" (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma. Airflow limitation and shortness of breath are features of COPD, and lung function testing is used to establish its presence. Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease.

65 Fed. Reg. 79,939 (Dec. 20, 2000).

[9] Employer notes that the issue of legal pneumoconiosis was subsumed in its challenge of the administrative law judge's finding on disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii); *see Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015)(Boggs, J., concurring and dissenting); Employer's Brief at 9.

Decision and Order Awarding Benefits and his finding that employer failed to rebut the presumption pursuant to Section 718.305(d)(ii). We remand the case for the administrative law judge to properly determine whether employer rebutted the presumption as to the existence of clinical and legal pneumoconiosis[10] and to apply the proper standard in determining whether employer has rebutted the presumption of disability causation.

In this case, the administrative law judge rejected Dr. Bellotte's disability causation opinion because, while diagnosing claimant with asthma, he did not "sufficiently [disassociate] [claimant's] asthma, or its severity, from his coal mine dust exposure." Decision and Order at 18. The administrative law judge did not, however, address the fact that Dr. Bellotte stated that claimant's respiratory disability was due to his hiatal hernia and GERDS. Moreover, he failed to acknowledge that Dr. Bellotte stated that claimant's asthma was not due to coal mine employment and that claimant had neither clinical nor legal pneumoconiosis, noting that claimant:

> Has no chronic dust disease of the lungs, or the sequelae thereof, that has been caused by, contributed to, or material [sic] aggravated by coal dust exposure in his coal mine employment history.

Employer's Exhibit 3 at 8. The administrative law judge must, therefore, determine whether the evidence, including, Dr. Bellotte's opinion, rebuts the existence of legal pneumoconiosis by considering all of the relevant evidence to determine whether claimant's respiratory impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(b); 718.305(d)(1)(i)(A). The administrative law judge also must determine whether employer has rebutted the presumption as to the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B). If he finds that employer has not rebutted the presumption under 718.305(d)(i), the administrative law judge must then consider whether employer has rebutted the presumption of disability causation by establishing that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii). In determining whether the presumptions of

[10] The administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis, but that claimant had legal pneumoconiosis "through the operation of [a] legal presumption," namely invocation of the Section 411(c)(4) presumption. Decision and Order at 16. However, as the administrative law judge found claimant entitled to the Section 411(c)(4) presumption of pneumoconiosis, *see* 20 C.F.R. §§718.202(a)(3), 718.305, the burden shifts to employer to disprove the existence of both clinical and legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B). The administrative law judge failed to consider whether employer met its burden pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), (B).

legal pneumoconiosis and disability causation are rebutted, the administrative law judge must consider the totality of Dr. Bellotte's opinion regarding the causes of claimant's disabling respiratory impairment. The administrative law judge must also determine whether Dr. Bellotte's opinion is reasoned.[11] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

[11] The United States Court of Appeals for the Fourth Circuit has held that it is permissible for an administrative law judge to consult the preamble to the regulations. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). However, the preamble does not expand the reach of the regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012). The preamble sets forth scientific studies found credible by the department and on which it relied in drafting the regulations. Consequently, in evaluating particular medical conditions, as referenced in the preamble, the administrative law judge should be mindful of specific study findings.